

UIIdaho Law Digital Commons @ UIIdaho Law

Not Reported

Idaho Supreme Court Records & Briefs

3-14-2013

State v. Alfaro Appellant's Reply Brief Dckt. 38500

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Alfaro Appellant's Reply Brief Dckt. 38500" (2013). *Not Reported*. 173.
https://digitalcommons.law.uidaho.edu/not_reported/173

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

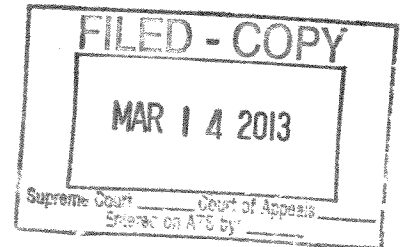
STATE OF IDAHO,)
)
Respondent,)
)
vs.)
)
MICHAEL ALFARO,)
)
Appellant.)
_____)

S.Ct. No. 38500
Canyon County Case No. CR-2009-26795

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE THOMAS J. RYAN
District Judge



Robyn Fyffe
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Appellant

Attorneys for Respondent

TABLE OF CONTENTS

I.	Table of Authorities	ii
II.	Argument in Reply	1
	A. Prosecutorial Misconduct Violated Mr. Alfaro’s Constitutional Right to a Fair Trial	1
	B. There was Insufficient Evidence to Support the Verdict	3
	C. The District Court Abused its Discretion and Violated Mr. Alfaro’s Constitutional Rights to a Jury Trial and Due Process by Sentencing Him More Harshly Based on His Exercise of His Right to Trial	5
III.	Conclusion	7

I. TABLE OF AUTHORITIES

STATE CASES

<i>State v. Norton</i> , 151 Idaho 176, 254 P.3d 77 (Ct. App. 2011)	2
---	---

II. ARGUMENT IN REPLY

A. Prosecutorial Misconduct Violated Mr. Alfaro's Constitutional Right to a Fair Trial

The prosecutor's rebuttal closing argument includes the following exchange:

Prosecutor: [Defense counsel] in the opening told you they weren't contesting the shooting and the death of Carlos Chavez. [Defense counsel] stood here and told you they weren't contesting the shooting of Carlos Chavez. The only issues is Michael the driver. Yet [defense counsel] spent the last hour contesting the details of the shooting. That's what his closing was doing.

Defense: Judge, for the record, I'll object to the characterization and as to the court's rulings previously.

Prosecutor: We just went on an hour-long red herring fishing trip.

Defense: Same objection, Judge.

Court: You're allowed a continuing objection.

Tr. Vol. VI p. 822, ln. 17 - p. 824, ln. 6. The prosecutor's argument, particularly characterizing defense counsel's entire closing argument as a red-herring fishing trip, went beyond asking the jury to return a verdict based on evidence, instructions and permissible inferences. The prosecutor's argument instead disparaged defense counsel and ridiculed Mr. Alfaro's entire defense thereby depriving him of his due process right to a fair trial.

In response, that State argues that the prosecutor's comment was directed at defense arguments rather than defense counsel and, thus, was not improper. Respondent's Brief, p. 10. Initially, the prosecutor's comments were not directed solely at defense theories. Instead, the prosecutor told the jury that defense *counsel* misled the jury into thinking the defense would not contest Carlos' shooting and that defense counsel had instead spent the past hour contesting the shooting. In then announcing "we just went on an hour-long red herring fishing trip," the prosecutor communicated to the jury that jury that defense counsel spent an hour distracting and misleading them. The prosecutor thus disparaged defense counsel as well as the defense

theories.

Further, referring to a specific defense argument as a red herring focuses the disparagement on the argument itself whereas telling the jury that defense counsel spent the past hour misleading the jury disparaged counsel by communicating that counsel personally tried to deceive the jury. The State urges that the proper focus under *State v. Norton*, 151 Idaho 176, 254 P.3d 77 (Ct. App. 2011) is to “focus on the subject of the disparagement [counsel versus counsel’s arguments], not the quantity of arguments disparaged.” Respondent’s Brief, p. 10. However, informing the jury that defense counsel took the jury on an hour-long red herring fishing trip tells the jury to disregard counsel rather than to disregard specific theories because they are not relevant or supported by evidence. For instance, the prosecutor’s rebuttal argument referred to the oddly placed pool of blood as a “fishing trip.” *Cf* Tr. Vol. VI p. 826, ln. 7-8. This comment is far less problematic because it occurs in the context of a specific argument and is accompanied by an evidence based explanation. Conversely, the complained of exchange ridiculed the entire defense and thus encouraged the jury to disregard everything defense counsel had said rather to reject one or more defense theories.

The prosecutor’s conduct was particularly unfair because the entirety of defense counsel’s argument cannot be characterized as peripheral or simply contesting shooting of Carlos. Instead, counsel described how there was insufficient evidence to show that the drive-by with Mr. Alfaro allegedly at the wheel was the same drive-by that resulted in Carlos’ death, that the Eastersider’s testimony that Mr. Alfaro was the driver was not credible and that the shooting was the result of an internal Westsider conflict, not Eastside fire.

The prosecutor engaged in misconduct by telling the jury that defense counsel was trying

to distract the jury. Although Mr. Alfaro objected, the district court did not sustain the objection or give the jury a curative instruction. The prosecutor's comment discouraged the jury from duly considering the numerous problems with the State's evidence, which were addressed during the course of Mr. Alfaro's argument, and this Court cannot say that the impermissible argument did not affect the verdict beyond a reasonable doubt. Accordingly, the prosecutorial misconduct deprived Mr. Alfaro of his right to a fair trial and his judgment of conviction must be vacated.

B. There was Insufficient Evidence to Support the Verdict

As described by the State, "in the summer of 2004, the violent rivalry between Eastside and Westside gangs in Caldwell, Idaho wrought a torrent of drive-by shootings." Respondent's Brief, p. 5. Indeed, three such shootings were reported to the police at Harvey's house in the month of August alone and there were at least two shootings reported the night Carlos was killed. *See* Tr. Vol. VI p. 412, ln. 1 - p. 413, ln. 12; p. 709, ln. 6-23. It is safe to assume that not every drive-by shooting was reported to police. Given this "torrent" of drive-by shootings and the inability of the Eastside witnesses to competently identify *when* Mr. Alfaro allegedly drove a vehicle carrying Richard, Evan and Arandu into Westside territory, there was insufficient evidence to tie that event to the death of Carlos beyond a reasonable doubt.

None of the Eastsiders competently testified that the night Mr. Alfaro allegedly drove around in Westside territory was the same night Carlos was killed. Significantly, Mario's testimony and that of an investigating officer establish that he observed Evan and Arandu get into a vehicle on an entirely different evening than the night Carlos was shot. A police officer testified that he investigated a drive-by shooting that occurred approximately three and one half hours before Carlos was shot, which occurred near Mario's and during which a bullet passed by

Mario's leg. Tr. Vol. VI p. 657, ln. 20 - p. 659, ln. 8. Mario testified that this drive-by shooting occurred on a *different* night than the night Mike and Richard picked up Arandu and Evan. *Id.* at p. 260, ln. 2 to 261, ln. 7. Given the officer's contemporaneous documentation of the date of the shooting at Mario's, the inescapable conclusion is that Mario observed Arandu and Evan get into a vehicle with Mike and Richard on a night other than the one in which Carlos was shot.

When Evan met with investigators almost a year after Carlos was shot, he could not identify the time of year he had been in the car or the time of day, other than to say it was dark. Tr. Vol. VI p. 401, ln. 21-25; p. 402, ln. 1-4; p. 403, ln. 8-11; p. 405, ln. 21-25. Although Evan testified about an event on "August 14," it is apparent that his testimony concerning the date was not based on personal knowledge. Although Richard testified that he and Mike picked up Evan and Arandu the evening of August 13, 2004, there was no foundation or basis for his belief that the six year old event occurred on that particular date. Both Evan and Richard testified to driving by a house in Westside territory with two, not three people standing outside and the time line established by Richard, Evan and Mario would have placed the vehicle at Harvey's at approximately 1:00 in the morning, not 3:30. Other than the conclusory testimony concerning the date, no evidence establishes that Richard and Mike picked up Evan and Arandu drove into Westsider territory the same night Carlos was killed.

Nor can the link be derived from the Westsiders' testimony. While Harvey testified that the vehicle that shot at his house only drove by one time and did not turn around, Sael testified that the vehicle drove by once and then returned. Tr. Vol. VI p. 33, ln. 8-21; p. 89, ln. 17-25; p. 92, ln. 19-25 *Id.* at p. 110, ln. 7 - p. 111, ln. 12; p. 124, ln. 1-9; p. 125, ln. 5-23. Harvey remembers the lights being turned off whereas Sael did not. *Id.* Sael said the car was going fast

while Harvey said it was going slow. *Id.* Thus, nothing in the Westsider's testimony could be used to link the vehicle involved in the drive-by shooting to the one driven by Mr. Alfaro, such as the make or color of the vehicle or even consistent testimony about whether the vehicle turned around or had its headlights off.

Viewed in the light most favorable to the prosecution, Mr. Alfaro drove a car in which passengers shot at a Westsider's residence shortly after midnight sometime during the summer or fall of 2004. Had Caldwell not been a gang war zone with multiple drive-by shootings that summer, this evidence might have been constitutionally sufficient to prove that Mr. Alfaro drove the vehicle to Harvey's residence at 3:30 a.m. on August 14. Constitutionally insufficient evidence was presented to prove beyond a reasonable doubt that Mr. Alfaro participated in the drive-by shooting that claimed Carlos' life. Accordingly, his judgment of conviction must be vacated.

C. The District Court Abused its Discretion and Violated Mr. Alfaro's Constitutional Rights to a Jury Trial and Due Process by Sentencing Him More Harshly Based on His Exercise of His Right to Trial

The district court sentenced Mr. Alfaro to twenty years to life for driving the vehicle in which Richard fired a weapon at Harvey's residence and for which Richard would be sentenced to a unified term of fifteen years with a minimum period of confinement of six years. Tr. Vol. VI § 7, p. 30, ln. 17-25; p. 56, ln. 7-12. The district court opined that Richard's plea bargained sentence did not serve justice but that the State was forced into those agreements because Mr. Alfaro exercised his right to a jury trial. *See* Tr. Vol VI, Tab 7, p. 54, ln. 22 - p. 55, ln. 2. Unable to fashion the co-defendants' sentences in a manner that sends an adequate message to "trash" such as Mr. Alfaro, the district court took his frustration on Mr. Alfaro and punished him for

exercising his right to trial. *See id.* at p. 55, ln. 3-20. This disparate treatment and the district court's sentencing was an abuse of discretion and violated Mr. Alfaro's right to a jury trial and due process.

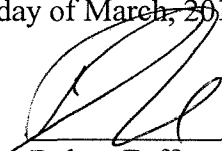
In response, the State notes that a disparity in sentencing among co-defendants in the same criminal activity does not make the harsher sentence per se excessive or an abuse of discretion and argues that there was no evidence that the district court punished Mr. Alfaro for exercising his right to trial. Respondent's Brief, p. 13-14. To the contrary, the district court indicated "one of the things that has weighed on this court's mind ever since there's been a conviction is how can the court treat Mr. Alfaro any differently than the state agreed to treat Mr. Maceda or the state agreed to treat Mr. Alaniz?" Tr. Vol VI, Tab 7, p. 55, ln 3-7. The district court then indicated the crime involved deliberate disregard for human life (a factor present with all the co-defendants) and expressed the need to communicate that the community cannot allow such conduct to continue. This reasoning ties the disparity to general deterrence rather than Mr. Alfaro's potential for rehabilitation, which would have been a legitimate reason for treating a defendant who puts the State to its proof differently than a defendant who accepts a plea bargain. The district court's comments reflect frustration that Mr. Alfaro's co-defendants received too little prison time as a result of Mr. Alfaro's exercise of his right to trial and then took that frustration out in sentencing Mr. Alfaro.

The district court sentenced Mr. Alfaro more harshly than other more culpable parties because he exercised his right to trial. This disparate treatment and the district court's sentencing was an abuse of discretion and violated Mr. Alfaro's right to a jury trial and due process and his sentence should be reversed.

III. CONCLUSION

For all the reasons set forth above and in his opening brief, Mr. Alfaro respectfully asks that this Court vacate his judgment of conviction and sentences.

Respectfully submitted this 14 day of March, 2013.

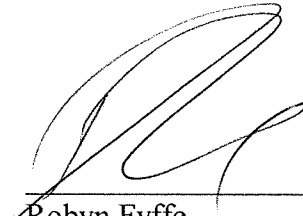


Robyn Fyffe
Attorney for Michael Alfaro

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of March, 2013, I caused two true and correct copies of the foregoing to be mailed to:

Office of the Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010



Robyn Fyffe